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09/913,330	08/13/2001	Shane Robert McGill	978-53	7091

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EXAMINER	
MADSEN, ROBERT A	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 02/10/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/913,330	MCGILL, SHANE ROBERT	
	Examiner	Art Unit	
	Robert Madsen	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *29 October 2003*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-56* is/are pending in the application.

4a) Of the above claim(s) *1-47 and 53-56* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *48-52* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date *August 13, 2001*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election without traverse of claims 48-52 in the Response filed October 29,2003 is acknowledged.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. Claim 48 is rejected under 35 U.S.C. 102(b) as being clearly anticipated by Purkapile (US 4946286).

4. See Column 1, lines 8-60.

5. Claim 48 is rejected under 35 U.S.C. 102(b) as being clearly anticipated by Miller (US 5653157).

6. See Column 3, line 30 to Column 4, line 10.

7. Claim 48 is rejected under 35 U.S.C. 102(b) as being clearly anticipated by Gordon (US 5363746).

8. See Abstract, Column 11, line 13 to Column 12, line 3.

9. Claims 48-51 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Chung (US 6011249).

10. See Column 1, line 65 to Column 2, line 55.

11. Claim 48 is rejected under 35 U.S.C. 102(e) as being clearly anticipated by Hochstein et al. (US 6258394 B1).

12. See Abstract , Column 3, lines63 to Column 4, line 31 and claims.

Claim Rejections - 35 USC § 103

13. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

14. Claim 49 is rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al. (US 5653157) as applied to claim 48 above, further in view of Wade et al. (US4828866)

15. Regarding claim 49, Miller et al. teach the frozen drink/shake is heated by a tempering freezer prior to mixing, as recited in claim 49 (Column 3, line 30 to Column 4, line 10), but is silent in using microwave energy. Wade et al. teach microwave energy may be used for heating a frozen shake prior to consumption (Column 1, lines 32-36). Therefore, it would have been obvious to modify Miller et al. and utilize microwave energy for heating the shakes before mixing since one would have been substituting one warming step for another for the same purpose.

16. Claims 50-52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al. (US 5653157) further in view of Wade et al. (US4828866) as applied to claim 49 above, further in view of Boulard (US 4937418).

17. Regarding claims 50 and 51, Modified Miller et al. teach heating a frozen shake by microwave energy, but are silent in teaching heating from an internal region of the container. Boulard teaches heating by microwave does not evenly the entire bulk of the material. As a result, Boulard teaches using internal antennae, as recited in claims 50 and 51, to evenly distribute the microwave energy (column 1, lines 9-23 and 45 -68). Therefore it would have been obvious to further modify Miller et al. and provide microwave energy from inside the container using antennae since Boulard teaches this is an efficient method for heating bulk material in a container and one would have been substituting one method of heating a container of material for another.

18. Regarding claim 52, Miller et al. teach carbonation during mixing (Column 4, line 54 to Column 5, line 10,Column 5, line 52 to column 6, line 13).

Double Patenting

19. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

20. Claim 48 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-9 of U.S. Patent No. 6,338,569 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because '569 claims a method of blending food products in a container fitted with a blending element, wherein the food product is filled into the container, the container is cooled, the container is in driving engagement with a drive means to blend the food, and the food is consumed (i.e. dispensed from the container).

21. Claim 49 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim1-9 of U.S. Patent No. 6,338,569, as applied to claim 48 further in view of Chirnomas (US 5027698).

22. '569 does not claim heating to a dispensing temperature prior to blending using microwave energy. Chirnomas is relied on as evidence of the conventionality of heating

frozen food products to a dispensing temperature and texture utilizing microwave energy (column 8, lines 3-32). Therefore to include heating a food product prior to mixing utilizing microwave energy would have been an obvious matter of choice, depending on the storage temperature and the desired dispensing temperature and texture, since Chirnomas teaches frozen products are desirably heated to a particular temperature and texture suitable for dispensing utilizing microwave energy.

23. Claims 50-52 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim1-9 of U.S. Patent No. 6,338,569, as applied to claim 48 further in view of Boulard (US 4937418).

24. Regarding claims 50 and 51, '569 does not claim heating from an internal region of the container using antennae. Boulard teaches mixing and heating material using antennae to heat internally by microwave since heating by microwave conventionally does not evenly heat the entire bulk of the material. Boulard teaches using internal antennae to evenly distribute the microwave energy (column 1, lines 9-23 and 45 -68). Therefore to provide microwave energy would have been an obvious matter of choice, depending on whether the food required heating. It would have been obvious to further '569 and provide microwave energy from inside the container using antennae since Boulard teaches this is an efficient method for heating bulk material in a container and one would have been substituting one method of mixing a container of material for another.

25. Regarding claim 52, '569 does not claim carbonation, but to include carbonation would have been an obvious matter of choice, depending on the particular type of food desired.

26. Claim 48 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of U.S. Patent No. 6,616323 B2. Although the conflicting claims are not identical, they are not patentably distinct from each other because '323 claims a method of blending food products in a container fitted with a blending element, wherein the food product is filled into the container, the container is in driving engagement with a drive means to blend the food, and the food is dispensed. '323 does not claim cooling and/or heating, but the process would involve a heating since mixing would heat the food product.

27. Claim 49 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of U.S. Patent No. 6,616323 B2 , as applied to claim 48 further in view of Chirnomas (US 5027698).

28. '323 does not claim heating to a dispensing temperature prior to blending using microwave energy. Chirnomas is relied on as evidence of the conventionality of heating frozen food products to a dispensing temperature and texture utilizing microwave energy (column 8, lines 3-32). Therefore to include heating a food product prior to mixing utilizing microwave energy would have been an obvious matter of choice,

depending on the storage temperature and the desired dispensing temperature and texture, since Chirnomas teaches frozen products are desirably heated to a particular temperature and texture suitable for dispensing utilizing microwave energy.

29. Claims 50-52 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of U.S. Patent No. 6,616323 B2 , as applied to claim 48 further in view of Boulard (US 4937418).

30. Regarding claims 50 and 51, '323 does not claim heating from an internal region of the container using antennae. Boulard teaches mixing and heating material using antennae to heat internally by microwave since heating by microwave conventionally does not evenly heat the entire bulk of the material. Boulard teaches using internal antennae to evenly distribute the microwave energy (column 1, lines 9-23 and 45 -68). Therefore to provide microwave energy would have been an obvious matter of choice, depending on whether the food required heating. It would have been obvious to further '323 and provide microwave energy from inside the container using antennae since Boulard teaches this is an efficient method for heating bulk material in a container and one would have been substituting one method of mixing a container of material for another.

31. Regarding claim 52, '323 does not claim carbonation, but to include carbonation would have been an obvious matter of choice, depending on the particular type of food desired.

Conclusion

32. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Nosaka et al. (US 5582854) and Boulard (US 4952069) teach microwave antennae for heating bulk material in a container. Costanzo teaches a food mixer.

33. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

34. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

35. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Robert Madsen
Examiner
Art Unit 1761

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